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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CLIFF EDWARDS,

Defendant and Appellant.

D076088

(Super. Ct. No. SCD280337)

APPEAL from a judgment of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Affirmed in part, vacated in part, remanded with directions.

Shay Dinata-Hanson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters and Julie L. Garland, Assistant Attorneys General, Melissa Mandel and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

After the People charged him with three counts of first degree burglary and robbery, Cliff Edwards in May 2019 pleaded guilty to one count of first

degree robbery (Pen. Code,¹ §§ 211, 212.5, subd. (a)), and admitted he suffered a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, 668), as well as two prior prison convictions (§§ 667.5, subd. (b), 668.) He stipulated to a 10-year prison term: the four-year midterm doubled for the strike conviction plus two one-year enhancements for his prior prison convictions. As part of the plea agreement, Edwards gave up his right to appeal “any sentence stipulated herein.”

On appeal, Edwards contends that notwithstanding the waiver of appellate rights in his plea, changes in the law resulting from Senate Bill No. 136 now require that this court strike his one-year enhancements or remand the case and direct the trial court to do so.² He further contends the court violated his due process rights by imposing assessments, fines and fees without first determining his ability to pay them. The People concede the first point. They argue Edwards cannot show imposition of fines, fees and assessments violated due process, but in any event any error by the trial court is harmless.

¹ Undesignated statutory references are to the Penal Code.

² Edwards has moved in this court to amend his notice of appeal to request a certificate of probable cause on grounds Senate Bill No. 136 was unforeseen at the time he entered his plea agreement. We ordered his request to be considered with the merits of his appeal. The People concede Edwards is not required to obtain a certificate of probable cause: “Because the law has changed and it is unlawful to impose the challenged enhancements on appellant’s sentence, no certificate of probable cause is required for defendant to raise this argument on appeal.” We agree with this concession. (*People v. Stamps* (2020) 9 Cal.5th 685, 698 (*Stamps*) [where defendant “seeks relief because the law subsequently changed to his potential benefit,” appeal does not attack the plea and does not require a certificate of probable cause].)

We remand this matter with directions that the trial court strike the prison term enhancements. In accordance with the California Supreme Court’s recent decision in *Stamps, supra*, 9 Cal.5th at pages 705-709, we further direct the court to allow the prosecution an opportunity to withdraw its assent to the plea agreement. We otherwise affirm the judgment.

DISCUSSION

I. *Senate Bill No. 136*

In May 2019, Edwards stipulated as part of his guilty plea that he “entered an inhabited dwelling and took property from the immediate possession of another by force or fear.” Following Edwards’s guilty plea, the Legislature enacted Senate Bill No. 136 effective January 1, 2020, which limits the application of prior prison term sentence enhancements to terms for sexually violent offenses. Subsequently, this court held the law applies retroactively to cases that are not yet final on appeal. (*People v. Keene* (2019) 43 Cal.App.5th 861, 865; *People v. Jennings* (2019) 42 Cal.App.5th 664, 681-682.)

As the People properly concede, Edwards is entitled to the benefit of the new statute despite his waiver of appellate rights. (§ 1016.8,³ see *People v.*

³ Section 1016.8, subdivision (a)(4), effective January 1, 2020, provides: “A plea bargain that requires a defendant to generally waive unknown future benefits of legislative enactments, initiatives, appellate decisions, or other changes in the law that may occur after the date of the plea is not knowing and intelligent.” Subdivision (b) of section 1016.8 provides that any provision of a plea bargain requiring a defendant to “generally waive future benefits of legislative enactments . . . or other changes in the law that may retroactively apply after the date of the plea is void as against public policy.” (See *People v. Barton* (2020) 52 Cal.App.5th 1145, 1152-1154.) The Legislature enacted section 1016.8 partly in response to this court’s decision in *People v. Wright* (2019) 31 Cal.App.5th 749, in which this court suggested parties might insulate plea agreements from the effect of future changes in the law. (*Id.* at p. 756; *Barton*, at p. 1153 [discussing legislative history].)

Barton, supra, 52 Cal.App.5th at pp. 1153-1154.) They state we should remand the matter with directions that the trial court strike the enhancements and resentence Edwards to a term no longer than the original plea.

We asked the parties to provide supplemental briefing on whether *Stamps, supra*, 9 Cal.5th 685, decided after completion of briefing, impacts the proper remedy here. In *Stamps*, the California Supreme Court addressed a defendant's remedy in a situation when recent changes to the law—a grant of new trial court discretion under section 1385 to dismiss previously mandatory enhancements—impacted his or her plea with a stipulated term. (*Stamps*, at pp. 705-709.) *Stamps* looked to whether the Legislature in passing section 1385 intended to overturn long-standing law preventing a court from unilaterally modifying an agreed-upon term. (*Id.* at p. 701.) It held the Legislature did not; the law was “silent regarding pleas” (*id.* at p. 704) and allowing a defendant to retain the benefits of his bargain would frustrate legislative intent to apply the law uniformly by creating “special rules” for plea cases. (*Ibid.*) This *Stamps* acknowledged, distinguished the circumstances from those in *Harris v. Superior Court* (2016) 1 Cal.5th 984, involving Proposition 47's “unambiguous language” covering defendants convicted by plea, reflecting an intent to modify or invalidate the terms of plea agreements without affording the People the opportunity to withdraw. (*Stamps*, 9 Cal.5th at pp. 702-704; *Harris*, at pp. 992-993; see *People v. King* (2020) 52 Cal.App.5th 783, 792.) Thus, *Stamps* rejected the defendant's argument that the proper remedy was to remand for the court to consider striking the enhancement while otherwise maintaining the balance of the negotiated plea agreement. (*Stamps*, 9 Cal.5th at p. 700.) *Stamps* stated: “If the court indicates an inclination to exercise its discretion [to strike an

enhancement] under section 1385, the prosecution may, of course, agree to modify the bargain to reflect the downward departure in the sentence such exercise would entail. Barring such a modification agreement, ‘the prosecutor is entitled to the same remedy as the defendant—withdrawal of assent to the plea agreement’ [Citation.] [¶] Further, the court may withdraw its prior approval of the plea agreement. The court’s authority to withdraw its approval of a plea agreement has been described as ‘near-plenary.’” (*Id.* at pp. 707-708.)

Edwards maintains *Stamps* is distinguishable; that given his plea and stipulated sentence the remedy is dictated by *People v. Matthews* (2020) 47 Cal.App.5th 857 (*Matthews*), in which the First District, Division Two Court of Appeal—emphasizing a plea agreement is a binding contract (*id.* at pp. 866-867) and contract law binds the parties and court to stipulated sentences in a plea (*id.* at p. 867)—held a trial court lacks the power to change a sentence imposed under a plea agreement “except to eliminate enhancements affected by Senate Bill No. 136.” (*Id.* at p. 866.) The *Matthews* court observed the author’s intent was to save California taxpayers the expense of long and overly-punitive sentences and stated: “[T]he purposes of Senate Bill No. 136 would be frustrated if the trial court were allowed to unilaterally alter agreed-to terms of a plea agreement after striking enhancement sentences as required by [the law].” (*Matthews*, at pp. 868-869.) It ordered the trial court to strike the one-year section 667.5, subdivision (b) sentences and leave intact the remainder of the sentences imposed under the plea. (*Id.* at p. 869.)

The People argue that Senate Bill No. 136 is not intended to effect unilateral changes to plea bargains, and thus under *Stamps*, Edwards’s proposed remedy would be “ ‘bounty in excess of that to which he is entitled.’ ”

(See *Stamps, supra*, 9 Cal.5th at p. 703.) They argue to the extent *Matthews, supra*, 47 Cal.App.5th 857 finds contrary legislative intent in Senate Bill No. 136, it is irreconcilable with the Supreme Court’s later decision in *Stamps*. The People say we must remand the case to permit the district attorney to either accept a reduction of the sentence or withdraw from the plea agreement.

We agree with the People. *Matthews, supra*, 47 Cal.App.5th 857 was decided before *Stamps* and did not have the benefit of its reasoning. Under *Stamps* the key inquiry is whether the Legislature in passing Senate Bill No. 136 intended to allow courts to unilaterally modify the terms of a negotiated plea without affording the People an opportunity to withdraw their approval. Like section 1385 in *Stamps* but unlike Proposition 47 in *Harris v. Superior Court, supra*, 1 Cal.5th 984, the law is silent on pleas “and provides no express mechanism for relief undercut[ting] any suggestion that the Legislature intended to create special rules for plea cases” (*Stamps, supra*, 9 Cal.5th at p. 704.) We cannot ascertain legislative intent to allow a court to unilaterally modify or invalidate the terms of a plea agreement without affording the People an option to rescind it. Accordingly, we remand the matter to the trial court with directions to strike the enhancement allowing the People (and the court) the opportunity to withdraw their approval of the plea.

II. *Imposition of Fines, Fees and Assessments*

At the sentencing hearing, Edwards’s counsel asked the court to stay all fines and fees based on Edwards’s inability to pay them during his ten-year prison term. The trial court declined to do so, and imposed on Edwards a court facilities assessment of \$30 (Gov. Code, § 70373), a \$40 court operations assessment (Pen. Code, § 1465.8), a \$154 criminal justice

administration fee (Gov. Code, § 29550), a \$41 theft fine (Pen. Code, § 1202.5) and a \$3,000 restitution fine (Pen. Code, § 1202.4). The court stayed an additional \$3,000 restitution fine under Penal Code section 1202.45.

Asserting he is indigent, Edwards contends the trial court violated his right to due process under the United States and California Constitutions by imposing these charges without holding a hearing on whether he had the present ability to pay them. He asks that we vacate the assessments and stay the fines, or alternatively remand the matter for the court to hold a hearing on his ability to pay. Edwards's claim is based on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

The People respond that *Dueñas* was wrongly decided; that Edwards's restitution fine should be reviewed not under due process principles but under the Eighth Amendment's excessive fines clause, as this court held in *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 13, 2019, S257844. The California Supreme Court will resolve two issues in *Kopp*: “[1] Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments? [and (2)] If so, which party bears the burden of proof regarding defendant's inability to pay?”

We need not address the areas of disagreement with *Dueñas* by this and other courts. (See, e.g., *People v. Allen* (2019) 41 Cal.App.5th 312, 318, 326-327; *People v. Hicks* (2019) 40 Cal.App.5th 320, review granted Nov. 26, 2019, S258946.) As the People argue, we agree any assumed error was harmless beyond a reasonable doubt given future wages Edwards may earn in prison. (*People v. Jones* (2019) 36 Cal.App.5th 1028, 1035 [*Dueñas* error subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18]; *People v. Johnson* (2019) 35 Cal.App.5th 134, 139-140 [same]; see *People v. Jenkins* (2019) 40 Cal.App.5th 30, 41, review granted Nov. 26, 2019,

S258729 [court may consider wages defendant may earn in prison on his ability to pay fines and assessments]; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1076 [court may consider defendant's future ability to pay]; *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; § 2085.5 [outlining how a restitution fine balance may be collected from prison wages].)

“[E]very able-bodied” prisoner must work while imprisoned. (§ 2700.) “Wages in California prisons currently range from \$12 to \$56 a month.” (*People v. Jones, supra*, 36 Cal.App.5th at p. 1035, citing in part Cal. Code Regs., tit. 15, § 3041.2, subd. (a)(1).) “ ‘The state may garnish between 20 and 50 percent of those wages to pay the section 1202.4, subdivision (b) restitution fine.’ ” (*People v. Lowery* (2020) 43 Cal.App.5th 1046, 1060; see also *Jones*, at p. 1035, citing § 2085.5, subd. (a) & Cal. Code Regs., tit. 15, § 3097, subd. (f).) While \$3,265 in fees, assessments and fines is substantial and it may take some time for Edwards to pay this amount, “that circumstance does not support his inability to make payments on these amounts from either prison wages or monetary gifts from family and friends during his lengthy prison sentence.” (*People v. Aviles, supra*, 39 Cal.App.5th at p. 1077.) Edwards was 50 years old at the time of his May 2019 guilty plea and nothing in the record suggests Edwards is unable to work a prison job. “In our view, this forecloses a meritorious inability to pay argument.” (*Jones*, at p. 1035.) Though Edwards maintains the record is insufficient to make this finding, and he argues there is no guarantee he will secure a prison job, the length of time he faces in prison belies this argument. “It is illogical to conclude that [Edwards] will not have an ability to begin paying at least some of the imposed fees, fines and assessments while [he is] incarcerated.” (*Lowery*, at p. 1061.)

DISPOSITION

The sentence is vacated and the matter remanded with directions that the trial court strike the two one-year enhancements imposed under section 667.5, subdivision (b). The court shall allow the People to either accept the reduction in sentence, but absent that, give the People the opportunity to withdraw their prior approval of Edwards's plea agreement. Once the new judgment is entered the trial court shall amend the abstract of judgment and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

GUERRERO, J.